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NO. 73-1888

IN THE

Supreme Court of the United States

October Term, 1973

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF ALASKA, *Respondent*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES K. CRANSTON
425 G Street, Suite 540
Anchorage, Alaska 99501

THOMAS M. PHILLIPS
30th Floor, One Shell Plaza
Houston, Texas 77002

NORMAN C. GORSUCH
Attorney General of Alaska
Pouch K
Juneau, Alaska 99801

Attorneys for Respondent

BAKER & BOTTS
Of Counsel

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

This case involves the determination of whether the disputed area of Cook Inlet is an historic bay as that term is applied in Paragraph 6, Article 7, of the Convention on the Territorial Sea and the Contiguous Zone (TIAS No. 5639). The parties and each of the Courts previously deciding this case have agreed that the legal criteria to be applied are contained in a United Nations Study, *Juridical Regime of Historic Waters, Including*

Historic Bays, U. N. Doc. A/CN, 4/143 (1962). (Hereinafter referred to as *Juridical Regime*) And subject to certain qualifications imposed by this Court upon disputes between the Federal Government and individual State Governments, this Court has followed the legal criteria contained in the *Juridical Regime*. *United States v. California*, 381 U.S. 139, 172 (1965). This Court has also recognized that the application of the concept of historic waters necessarily raises "primarily factual questions" which must be left to the trier of the facts. The *Louisiana Boundary Case*, 394 U.S. 11, 75.[1]

As to the questions presented, Alaska's position is:

1. There was an explicit claim to Cook Inlet as well as a sufficient and continuous exercise of sovereignty to establish historic title to Cook Inlet as inland waters.

2. While the law is not authoritatively settled by this Court as to whether toleration or acquiescence by foreign nations is the proper requirement for the emergence of historic title, the trial court correctly held that the question was immaterial, since, under the facts, Alaska had proved acquiescence—the higher standard.

3. Since this Court has held that the Federal Government cannot, under the guise of conducting

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1. The fact issues involve a determination as to whether the three criteria deemed necessary by the *Juridical Regime* to support historic bay status have been met. These are: (1) has the state claiming the right exercised sovereignty over the area; (2) has there been a continuity of the exercise of sovereignty; and (3) have foreign states acquiesced in the exercise of sovereignty. *U. S. v. Louisiana*, 394 U.S. 11, 23-24 (1969).

foreign relations, undertake the contraction of the territorial limits of a state,[2] the District Court properly found that the so-called disclaimers were not controlling in this case in which the historic evidence was clear beyond doubt.

4. This Court has held that the application of the doctrine of historic title "raises primarily factual questions,"[2a] and accordingly the District Court properly addressed itself to these questions. There being no claim that the findings are clearly erroneous, they should not be set aside.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

1. *Cook Inlet is not an historic territorial sea.*

The decision of the lower courts is in accord with prior rulings of this Court in *Louisiana* and *California*, as well as in accord with recognized principles of international law. Contrary to Petitioner's argument, neither this nor any other court has ever held, with respect to *bays* that are landlocked and necessarily inland, that only proof of interference with the right of innocent passage of foreign vessels can give rise to historic title to inland waters.

Petitioner's only authorities are passing footnote references by this Court[3] to the *Juridical Regime* wherein the possibility of historic territorial seas was noted. Doubtless such a possibility exists in the case of certain kinds of open waters.

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2. *United States v. Louisiana*, 394 U.S. 11, at p. 77.

2a. The *Louisiana Boundary Case*, 394 U.S. at 75.

3. *United States v. Louisiana*, 394 U.S. at 24 n. 28, 25-26 n. 30.

Here, of course, we are dealing with a bay whose waters are completely enclosed by the lands of Alaska.[4] Thus, the trial court found that because of the unique geographic characteristics of Cook Inlet—its landlocked status, its resemblance to a large inland lake, the fact that while in it a mariner instinctively feels himself within the jurisdiction and domain of Alaska, the fact that it is vital to the economic interests and well being of those who inhabit its shores, and the fact that it has never been a waterway for intercourse between nations—it would have been unnatural had not those inhabiting its shores exercised sovereignty over its waters.

As to bays, the *Juridical Regime* states at Paragraph 163:

> ". . . the dominant opinion, as gathered from the statements assembled in the memorandum [*Historic Bays,* Document A/Conf. 13/1] (Exhibit 52), seems to be that 'historic bays' the coasts of which belong to a single state are internal waters. This was to be expected considering that it is generally agreed that the waters inside the closing line of the bay are internal waters and that the territorial sea begins outside that line."

In the treatise, *Historic Bays*, it is stated:

> "It is always necessary to remember in dealing with 'historic waters,' the essential point that those waters are internal waters. This fact explains many aspects which would be otherwise difficult to grasp. The theory was originally evolved to apply to 'bays,' and is still referred to as the theory of 'historic bays'

4. For a more complete description of these waters see Findings of Fact 4-15, incl. (pp. 22a through 24a, Appendix C, Petition for Writ of Certiorari.)

because it was never envisaged that it might apply except in areas which, by reason of their configuration, are generally not used as major international routes of transit." *Historic Bays* 117.

The Convention on the Territorial Sea and the Contiguous Zone itself refutes Petitioner's argument that Cook Inlet is territorial sea but not inland water. In Article 7, the Convention addressed itself to the question of what precise mathematical distances across the entrance points to bays would be required to qualify as inland waters.[5] It was from the seaward edge of these inland waters that the territorial sea extended. When, in Paragraph 6 of the Article, the Convention excepted historic bays from the mathematical requirements it necessarily declared that the waters inside the natural entrance points to historic bays were inland waters from whose seaward edge the territorial sea extended. This, we submit, is the only sensible meaning to be accorded Article 7 and Paragraph 6 thereof. When the lower courts found Cook Inlet to be an historic bay, the holding was inevitable that Cook Inlet was internal waters.

There is absolutely no evidence in the record, and Petitioner has cited none, that shows that either the United States or the State of Alaska has ever permitted or recognized the right of innocent passage of foreign vessels in the disputed area of Cook Inlet. Passage is defined as including the "stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." (See P. 11, United States' Brief in Court of Civil Appeals for the Ninth Circuit). Every inference in the record, borne out by the express testimony of numer-

5. *Louisiana Boundary Case*, 394 U.S. at 22 n. 22.

ous witnesses, is to the effect that the practice of foreign vessels stopping and anchoring within the confines of lower Cook Inlet would be prohibited.[6] The District Court, it will be noted, relied upon this evidence and expressly found that "Cook Inlet is not and never has been a waterway for intercourse between nations."[6a]

The presence of a few foreign shipping vessels in Cook Inlet en route to Anchorage is no more evidence that Cook Inlet is a territorial sea than the presence of a thousand foreign shipping vessels in San Francisco Bay is evidence that San Francisco Bay is a territorial sea. As Colombos stated in his well known treatise, *The International Law of the Sea*, the interests of international commerce and navigation have given rise to an international, modern custom of allowing free access of foreign shipping vessels to internal waters and access "should not be refused except on compelling national grounds." (6th Rev. Ed. [1967] pp. 87-88)

In the District Court, Petitioner's main thesis was that there had been no claim of sovereignty of any kind. When

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6. For example, in Skerry Dep., p. 29, we find:

"Q. Would you have required, for instance, if a foreign vessel wanted to fish Cook Inlet with gear, would they have been required, also, to register?

A. He wouldn't have been allowed in there in the first place. He could have come in Force Majeure or something of this sort. But to fish, no."

And see Studdert Dep., p. 22, where Studdert, another federal official, testifying with regard to foreign vessels stated:

"Q. And why would you have gotten the vessel out of there, Mr. Studdert?

A. Well, if it was a foreign ship, why you would not only get her out, but you would seize the ship, you know, if you could."

6a. Finding 10, P. 23a, Appendix C, Petition for Writ of Certiorari.

faced with overwhelming evidence to the contrary, Petitioner shifted its position upon appeal and now implicitly admits that the three essential requirements for historic title have been proved, albeit historic title to territorial sea rather than historic bay. In shifting its position, the attorneys for the United States would now have this Court create from whole cloth a novel legal entity—an historic, necessarily inland, territorial sea bay. This would appear to be a self-contradictory kind of bay and Cook Inlet would be the first of its kind in all of jurisprudence. For the United States has cited no case, and there is none, where an historic, geographically inland, water bay has been declared to be an historic territorial sea in the sense that these terms are currently used. Such a creation is surely a figment of imagination.

1.a. *There has been an explicit claim to Cook Inlet as internal waters.* The claim, we submit, is found in the "variety of Acts of Congress, Executive Orders, agency regulations governing fishing in the waters of Alaska" which Petitioner recognizes,[7] but then ignores. The language of the various statutes and proclamations (The Alien Fishing Act, The White Act, The Southwestern Alaska Fisheries Reservation) refers to waters of Alaska under the jurisdiction of the United States. This brings us to the fundamental question: Was jurisdiction (or sovereignty) asserted by the United States over Cook Inlet as waters of Alaska? To answer the question, it is necessary to trace the history of various statutes that have been enacted with respect to the waters of Alaska. It is necesary also to depict the claims to Cook Inlet at the time each statute and regulation was promulgated.

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7. P. 13, Petition for Writ of Certiorari.

R.S. 1956 and the Kodiak Case. The earliest statute, Article 1956, was involved in the *Kodiak* case.[8] It provided that "no person" shall kill otter or other fur-bearing animals "within the limits of Alaska territory or in the waters thereof." Thus it was that the Court in the *Kodiak* case was faced with the same contention now urged by the United States, to wit: that since the defendant had allegedly killed fur-bearing animals more than 3 miles from the shoreline of Cook Inlet, the statute was not applicable, the phrase "in the waters thereof" being construed to mean a distance of 3 miles from the shore of Cook Inlet. As we see it, this is precisely the contention now urged by the United States.

The Court said:

> "The contention is not a valid one.
>
> * * *
>
> . . . it can hardly be claimed that any portion of Cook's Inlet is 'high seas,' within the accepted meaning of the phrase, for it is well landlocked by islands extending from Kodiak Island to Cape Elizabeth, on the east, and can only be entered by coming in near some of these islands, or by the way of Shelikof straits. [53 Fed., p. 128]"

Having taken the unique geographical status of Cook Inlet into consideration, the Court made clear that its basis for jurisdiction rested upon assertions of sovereignty over Cook Inlet by the United States.

The Alien Fishing Act, The Southwestern Alaska Fisheries Reservation and The White Act. With this precedent before it—a clear-cut judicial holding that Cook Inlet was water over which the United States had asserted

8. 53 Fed. 126 (D.C. Alaska 1892).

jurisdiction—Congress enacted The Alien Fishing Act in 1906[9] and The White Act in 1924.[10] The operative words in The Alien Fishing Act were "waters of Alaska under the jurisdiction of the United States," while in The White Act the key words were "any of the waters over which the United States has jurisdiction." Both statutes have substantially the same language and both have language almost identical with Article 1956.

During the next 53 years, until Alaska gained Statehood, the Secretary of Commerce and later the Secretary of Interior, exercised their statutory authority to regulate the "waters of Alaska," and annually defined Cook Inlet as including "*all* adjoining waters north of Cape Douglas and west of Point Gore (including the Barren Islands)."[10a] (Emphasis added)

To say that these executive regulations are not clear is to defy the English language, particularly when their judicial and legislative precedents are taken into account. To claim that these regulations were not brought to the attention of all foreign nations is to ignore the fact that each year, for more than three decades, they were published and distributed throughout the world.

We suggest that, if today the author of the regulations was given the chore of asserting United States sovereignty

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9. The Alien Fishing Act excluded aliens from the waters in question.

10. The White Act granted the Secretary of Commerce and later the Secretary of Interior the power to "set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction."

10a. Other areas in Alaska such as Bristol Bay were defined to include "territorial coastal and tributary waters". The absence of these words in the definition of Cook Inlet, by contrast, makes unmistakably clear the meaning of the regulation in question.

over Cook Inlet, he would have difficulty in finding clearer and more precise words than the words "all adjoining waters north of Cape Douglas, etc."

1.b. *There was the actual requisite assertion of sovereignty over Cook Inlet.* The principles applicable to the exercise of sovereignty are best summarized in the *Juridical Regime* where its authors adopted the argument of Norway in *United Kingdom v. Norway*:

> "It cannot seriously be questioned that in the application of the theory of historic waters, acts under minicipal (sic) law on the part of the coastal state are of the essence. Such acts are implicit in an historic title." 93.

Consistent with that statement, the District Court found that Russia exercised such sovereignty over Cook Inlet and that all of it fell under exclusive Russian dominion by the early 1800's;[11] that in the enforcement of laws *applicable only to waters of Alaska under the jurisdiction of the United States,* agents of the United States either arrested or boarded the following American vessels in the disputed area: the KODIAK, LETTIE and JENNIE in 1892; the OLGA and MARY ANDERSON in 1893; the NEW ENGLAND and ZAPORA in 1924;[12] found continuous patrolling of and numerous boardings within the disputed area by the United States agents under The White Act and The Alien Fishing Act;[13] and it found six arrests of United States citizens in the disputed area,

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11. Finding 18, p. 25a, Appendix C, Petition for Certiorari.

12. Findings 22-39, pp. 26a-30a, Appendix C, Petition for Certiorari.

13. Findings 40-47, pp. 30a-33a, Appendix C, Petition for Certiorari.

all under regulations which by their terms were applicable only to waters of Alaska under the jurisdiction of the United States.[14]

Nevertheless, Petitioner argues that enforcement activity with respect to *American vessels* and *citizens* is irrelevant in establishing historic title under international law. Petitioner again ignores the *Juridical Regime*:

> "This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken." *Juridical Regime* 99.

And Petitioner also ignores the undisputed evidence that there was indeed enforcement activity and the exercise of United States and Alaska sovereignty against *foreigners*. The record shows that sovereignty was asserted against Japanese fishermen (through the seizure of the BANSHU MARU);[15] the submission of the Gharrett-Scudder line, depicting all of Cook Inlet as inland waters, to the Canadian Government and its apparent acceptance thereof;[15a] the wide publication and distribution throughout

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14. Findings 49-56, pp. 33a-35a, Appendix C, Petition for Certiorari.

15. It was the lack of this type of enforcement by Florida state officials which the Special Master found significant in the *Florida* case. P. 63a, Appendix F, Petition for Writ of Certiorari.

15a. For a more complete discussion of the Gharrett-Scudder Line, see pp. 14-A and 15-A, Appendix A, Brief of Alaska, Appellee, U.S.C.A. Ninth Circuit.

much of the world of federal laws and regulations banning aliens from fishing in Cook Inlet (The Alien Fishing Act); the openness, notoriety and continuity of both federal and state patrols that had continued uninterruptedly since 1906 and since the enactment of The White Act; and in the face of all of this, the complete absence of any type of protest (except the ineffectual and repudiated Japanese note) by any foreign nation against the continued exercise of sovereignty over Cook Inlet.

1.c. *The lower courts properly took into account all past events.* Petitioner, we believe, is wrong in criticizing the lower courts' reliance upon events occurring subsequent to the time when historic title had already ripened. This Court, in *Louisiana,* has recognized the impreciseness of the doctrine of historic title and necessarily understood the impossibility of pinpointing the minute and hour when historic title matured. The lower courts clearly acted with propriety when they pointed to the consistent and continuing assertions of sovereignty that lasted more than half a century. The continuing chain of jurisdiction is the essential fact rather than finding the exact moment historic title ripened.

1.d. *The District Court correctly examined all activities pursued by the Russians.* The District Court did not rely upon the isolated act of a private citizen. It is historic fact that Russian fur traders were acting as agents of the Russian Government, and as may still be the case today, there was little private initiative in or outside of Russia that did not have governmental sanction. Petitioner also ignores other Russian activity dealt with at length by the District Court.[16]

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16. Findings of Fact 17-21, incl., Appendix C, pp. 25a and 26a, Petition for Writ of Certiorari. See also the testimony of historians

1.e. *The lower court correctly assessed the significance of past Executive action taken pursuant to Congressional mandate.* It is true that the lower courts relied upon actions of various departments of the Executive Branch; but we disagree that the actions of the Secretaries of Interior and of Commerce are entitled to little weight when in all instances they were exercising an express mandate given them by Congress to define the waters of Alaska and issue regulations strictly enforcing and controlling all fishing therein and excluding aliens therefrom.

1.f. *State acts of sovereignty were also properly considered.* The lower courts, unless they disregarded this Court's holding in *Louisiana,* could not have failed to consider the action taken by the State of Alaska against Japanese fishermen.[17] And to say that the Shelikof Strait incident involved only an area 75 miles from Cook Inlet is an unnecessarily narrow, if not a distorted, view of the evidence. With the knowledge of the Japanese Government (although later repudiated by it), the Japanese fishermen agreed not to fish in an area which was mapped and which included Cook Inlet. In subsequently protesting the State seizures, the Japanese Government mentioned Cook Inlet as well as Shelikof Strait. (Ex. II) The only reason the Alaska officials did not seize the Japanese vessels in Cook

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DeArmond and Hunt, R. 520-570; 474-518; and finally Emperor Alexander's Ukase of 1821 and the correspondence of the United States Ambassador in St. Petersburg to the State Department with regard to the 1824 treaty and the recognition of Russian claims to occupied bays, which necessarily included Cook Inlet occupied by four Russian settlements as early as 1821, Ex. X, R. pp. 243-244, Ex. Y, R. p. 154.

17. See Special Master's Report in *Florida,* p. 3, Appendix F, Petition for Writ of Certiorari, wherein he also followed this Court's teachings in *Louisiana* and thus examined activity by Florida state officials.

Inlet was that they were not apprehended until they left Cook Inlet and came to rest in Shelikof Strait.

1.g. *The enforcement actions were and are relevant.* It is true many of the enforcement actions resulted in acquittals or dismissals, rather than the imposition of sanctions. If the dismissals had been based upon lack of jurisdiction the enforcement actions would truly be of dubious value. But to challenge their validity when the charges were not proved, but vigorously asserted, has no more logic than a challenge to the validity of any criminal statute because each year many defendants indicted thereunder are not convicted.

2. *The evidence was clear beyond doubt and largely undisputed that foreign nations have acquiesced in claims of sovereignty over Cook Inlet.*

The courts below did not depart from this Court's decisions in *United States v. California, supra,* and *United States v. Louisiana, supra.* On the contrary, the lower courts expressly recognized and relied upon this Court's ruling in *Louisiana* that, while principles of international law would be adopted in resolving domestic controversies of this sort, the Federal Government would not be permitted to distort those principles, under the guise of exercising power over foreign relations, and to deny the effect of past events. 394 U.S. at 77. The lower courts also noted this Court's admonition in *California* against an impermissible contraction of a state's territorial limits. *United States v. California,* 381 U.S. 139 at 168.

The line between "acquiescence" and "toleration" is a difficult one which this Court has never found necessary to draw, and this Court has never specified what particular acts of foreign nations are required. But neither this Court

nor any other court has ever held that nations must *expressly* approve another nation's claim of sovereignty before the latter's historic title matures. Any such requirement would be tantamount to requiring a treaty between nations for the creation of historic title. If this were so, the whole concept of historic title would become meaningless and there would be no necessity for requiring a continuous claim of sovereignty over a long time period. In approaching this question, the District Court said:

> "The final requirement for establishing historic title is the attitude of foreign nations. The precise attitude required has been defined by some as acquiescence and by others, perhaps most, by toleration. The United States Supreme Court has used language which indicates that the higher standard, acquiescence, is required. The distinction is immaterial in this case since, as a matter of law, the requirement has been satisfied under the higher standard of acquiescence. Under the finding set out above, the community of nations has acquiesced, clearly beyond doubt, in the emergence of historic title in the waters in dispute."[18]

The District Court found no nation had protested Russia's exercise of exclusive dominion over Cook Inlet; that despite the worldwide distribution of regulations containing a mandate for their enforcement, no nation had protested the United States' enforcement of The Alien Fishing Act, The Southwestern Alaska Fisheries Reservation or The White Act over Cook Inlet; and that Canada accepted the placement of the Gharrett-Scudder Line and its inclusion of Cook Inlet as inland waters of the United States. It found the rare occasions of individual Canadians fishing for halibut in Cook Inlet—only two undetected occurrences before Statehood, and only five undetected

18. Pp. 51a-52a Appendix B, Petition for Certiorari.

vessels thereafter—so small as to be *de-minimus.*[19] It found the Japanese response to the arrest by Alaskan officials of the BANSHU MARU in 1962 to be acquiescence in that no Japanese citizen or vessel has ever again fished in the disputed area once the Japanese fishing company with the consent of the Japanese Government agreed with Alaska not to fish in Cook Inlet.[20] Lastly, the Court found that the lack of foreign fishing in the disputed area, an area so clearly the subject of United States jurisdiction and control, constituted foreign acquiescence in that jurisdiction.[21]

The District Court carefully applied the rules contained in the *Juridical Regime* as to the attitude of foreign nations. The *Juridical Regime* quotes with approval an expert in the international law of bays, Bourguin, who supports the theory that the attitude required of foreign nations is that of acquiescence. The study states at Paragraph 109:

> "In such cases the question to be asked is not whether the other states consented to the claims of the coastal state but whether they interfered with the actions of that state to the point of divesting it of the two conditions required for the formation of historic title.
>
> Obviously only acts of opposition can have that effect. So long as the behavior of the riparian state

19. Findings 92-101, Appendix C, pp. 43a-44a, Petition for Writ of Certiorari.

20. Finding 99, p. 44a, Appendix C, Petition for Writ of Certiorari. Consider also the undisputed evidence that, although Japanese fishermen have since fished in other waters near Alaska, they have never ventured into either Cook Inlet or the Shelikof Strait. P. 18a, Appendix B, Petition for Certiorari.

21. Finding 102, p. 45a, Appendix C, Petition for Writ of Certiorari.

causes no protest abroad, the exercise of sovereignty continues unimpeded. . .

The absence of any reaction by foreign states is sufficient."[22]

3. *The disclaimers are unconvincing.*

The alleged disclaimers now urged by Petitioner reach a level of cynicism that is not becoming a powerful Federal Government. Nor are they convincing when it is remembered that (1) the first one was a letter written by one lawyer in one bureau to another lawyer in a different bureau; and (2) all the other disclaimers, drafted subsequent to this litigation, were authored or initiated by lawyers interested in the outcome of this litigation.

4. *In any event, the disclaimers are not controlling.*

Perhaps more clearly than anything else, the so-called disclaimers demonstrate the wisdom of this Court when, in *California*, it rejected the argument that disclaimers of all kinds and character are always to be given conclusive effect.

The District Court accepted Petitioner's view that, in the face of the disclaimers, Alaska's burden was that of proving the three requirements for historic title by evidence "clear beyond doubt." When this evidence is considered as a whole, it is likewise understandable why, in the lower courts, Petitioner did not claim that the District Court's findings were clearly erroneous.[22a]

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22. On this point, the Japanese protest to the BANSHU MARU arrest was insufficient to divest Alaska of its historic title, since in the face of continuing sovereignty a simple and single protest will not suffice. *Juridical Regime, Paragraphs* 112-115.

22a. Whatever the burden of proof—whether it be clear beyond doubt or some lesser standard—it is the initial responsibility of the

5. *The District Court properly exercised jurisdiction to resolve this dispute.*

As Respondent has attempted to demonstrate, the lower courts did not depart from prior decisions of this Court with respect to foreign relations. Indeed, Judge von der Heydt expressed his concern for judicial restraint and recognized that the conduct of foreign relations is constitutionally vested in Executive and Legislative Branches of the United States Government.[23] But also he realized that this and other federal courts have traditionally exercised jurisdiction to resolve fundamental law questions and basic fact issues between State and Federal Governments.[24]

He candidly stated, under the facts and circumstances of this case, that he saw no merit in the contention that a decision here in favor of Alaska would interfere with the conduct of foreign relations.

And the basis of his reasoning seems clear. This Court is not asked to give credence to the extravagant claims of other nations to territorial sea, but only to apply fundamental principles of international law which are, or should be, recognized by all nations. This the Court has done before, without apparent harm to our country's relations with other nations.

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trial court to evaluate the witnesses, appraise the evidence and make findings accordingly. These findings cannot be set aside by the Appellate Court unless they be found clearly erroneous. *Carlson v. Naddy*, 181 Minn. 217, 232 N.W. 3 (1930), *Taylor v. Bunnell*, 133 Cal. App. 177, 23 P.2d 1062 (1933).

23. Findings of Fact 21, p. 52a, Appendix C, Petition for Writ of Certiorari.

24. Findings of Fact 22, p. 52a, Appendix C, Petition for Writ of Certiorari.

Although Alaska concedes that this case has domestic consequences of some magnitude, Petitioner's prediction that Cook Inlet will yield 1.6 million barrels of oil, etc., is rather naive. Hoping that Petitioner's optimism will prove justified, nevertheless, Respondent knows that Cook Inlet, when finally explored, may not yield a single barrel of oil or gas.

But the point is this. The fact that here at stake may be a billion dollars, furnishes no justification for Petitioner's request that this Court favor one governmental entity over another.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should not be granted.[25]

Respectfully submitted,

CHARLES K. CRANSTON
Attorney for Respondent

THOMAS M. PHILLIPS
Attorney for Respondent

NORMAN C. GORSUCH
Attorney General of Alaska

July 1974

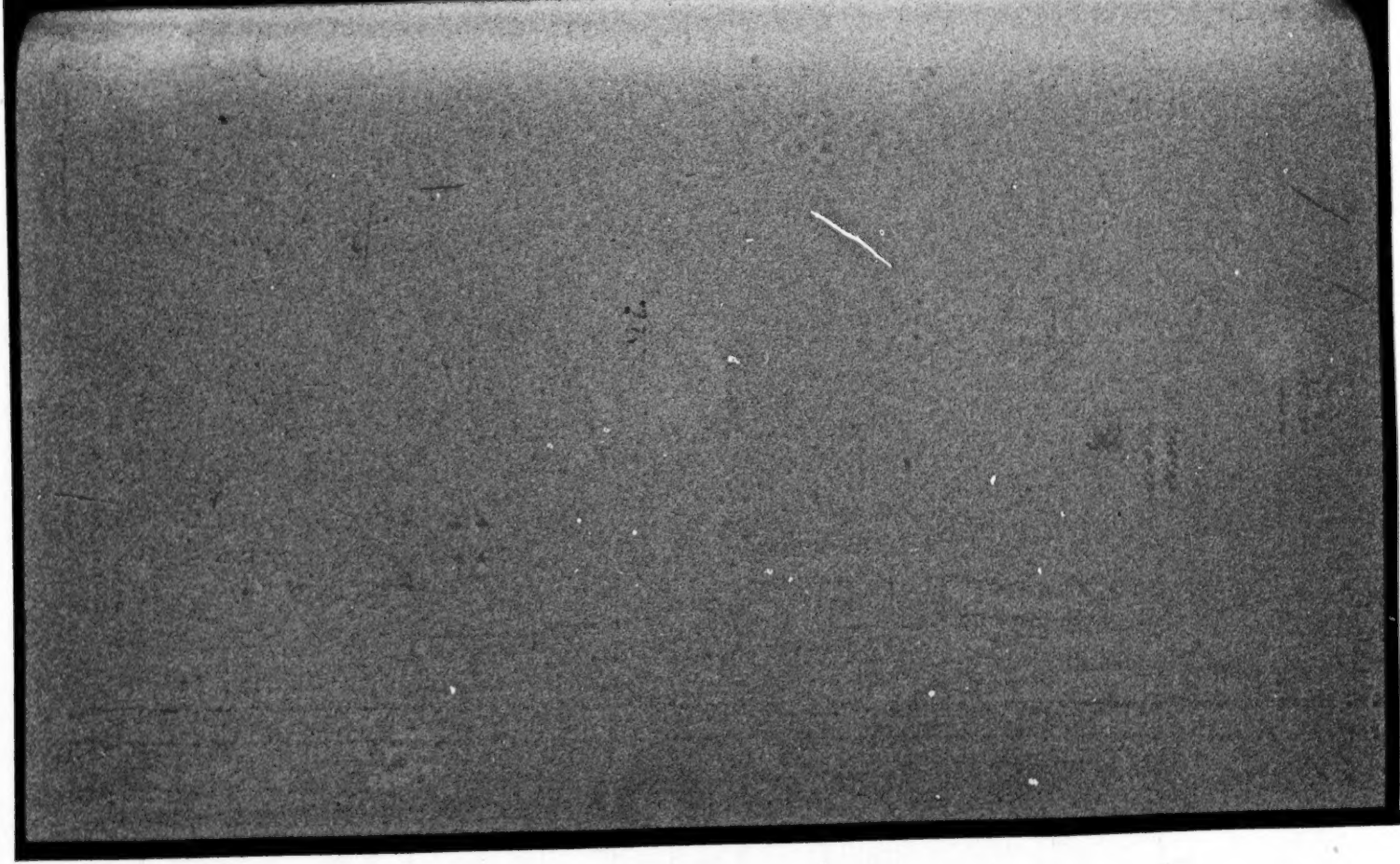
25. Attached as Appendices A and B are the Reply Brief and Supplemental Brief filed by Alaska in United States Court of Appeals for the Ninth Circuit. In these briefs will be found a more complete exposition of Alaska's arguments and review of the record in this case.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Respondent's Brief in Opposition has been forwarded to counsel for Petitioner, Robert H. Bork, Solicitor General, Wallace H. Johnson, Assistant Attorney General, Gerald P. Norton, Assistant to the Solicitor General, Bruce C. Rashkow and Edward F. Bradley, Attorneys, Department of Justice, Washington, D.C. 20530, this _____ day of July, 1974, by placing the same in the United States mail, correctly addressed and stamped.

Thomas M. Phillips

APPENDIX



APPENDIX A

No. 73-2400

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

STATE OF ALASKA, *Defendant-Appellee.*

On Appeal From The United States District Court For The District of Alaska

BRIEF FOR THE STATE OF ALASKA, APPELLEE

CHARLES K. CRANSTON
425 G Street, Suite 540
Anchorage, Alaska 99501

THOMAS M. PHILLIPS
One Shell Plaza
Houston, Texas 77002

JOHN E. HAVELOCK
Attorney General of Alaska
Pouch K
Juneau, Alaska 99801

Attorneys for Appellee State of Alaska

BAKER & BOTTS
30th Floor
One Shell Plaza
Houston, Texas 77002
Of Counsel

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v.

STATE OF ALASKA, *Defendant-Appellee.*

On Appeal From The United States District Court For The District of Alaska

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BRIEF FOR THE STATE OF ALASKA, APPELLEE

ISSUES PRESENTED FOR REVIEW

The State of Alaska, Appellee, has a different position from that of Appellant as to what issues are now to be reviewed by this Court. Appellant has stated, and correctly so, that the parties are in agreement as to the law in that there are three legal requirements for establishing historic title to the disputed water area (pp. 6 and 7, Appellant's Brief). It follows that this is and was primarily a *fact* controversy between the parties. To the extent that the United States has dealt with the facts in its brief, it has merely reiterated the factual contentions which it urged upon the trial court. Those contentions were sharp-

ly contradicted by the State of Alaska, and the trial court made its findings in the State's favor after due consideration of hundreds of documents, the testimony of many live witnesses, including four experts presented by the State and over thirty depositions offered by one side or the other.

1. The *primary* issue, as Alaska sees it, is whether the trial court was "clearly erroneous"[1] in finding that there was clearly proved beyond doubt:

a. An effective exercise of authority or sovereignty over the disputed waters by Alaska (after Statehood), the United States (prior to Alaska's Statehood), and Russia. (See Conclusions 14, 15, 16 and 17; R. 3805-3806); and

b. A continuity of the exercise of such authority. (See Conclusions 18 and 19, R. 3806); and,

c. With the acquiescence of foreign nations. (See Conclusion 20; R. 3806-3807)

Thus, while in its brief the United States apparently contends that there was some evidence which points to contrary findings and other evidence which it claims was legally irrelevant and should not have been considered, the United States does not meet the burden of establishing that there was no substantial evidence to support the lower court's ruling or of showing that the Findings below were clearly erro-

1. Unless the District Court's Findings are clearly erroneous, they must be upheld on appeal. Rule 52(a) F.R.C.P.; *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *Wilson v. United States*, 100 F.2d 552 (9th Cir. 1938); *Fluor Corp. v. United States ex rel. Mosher Steel Co.*, 405 F.2d 823 (9th Cir. 1969).

neous or irrelevant. We shall attempt to deal with these significant failures of Appellant in Part One of the Argument.

2. The *second* issue before this Court is whether Alaska could have proved the exercise of sovereignty over Cook Inlet only by proving an interference with the innocent passage of foreign vessels through the disputed area. This issue, which arises out of an improper and narrow construction of the first of the three requirements named above, was not seriously argued below and even represents an admission by the United States that Cook Inlet is an historic bay, albeit it claims the waters are territorial and not inland. No real authority has been cited for this novel proposition. We shall deal with this in Part Two of Appellee's brief.

3. The *third* and final issue raised in this appeal is whether the lower court in the light of so-called disclaimers of historic title by the United States, correctly applied the proper rule on quantum of proof, i.e. the "clear beyond doubt" rule or "preponderance of evidence" rule. This will be dealt with in Part Three herein.

STATEMENT OF THE CASE

Appellant, United States of America, has correctly stated the proceedings and the result in the district court.[2]

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2. The disputed area is the water underlying between the line designated "T" on Exhibit "A" to the district court judgment and the line designated "SL" on Exhibit "B" to the district court judgment. (R. 3813-3815).

So far as the factual evidence is concerned, Alaska directs the attention of this Court to the Findings of Fact and Conclusions of Law. (R. 3777-3810). They are unusually detailed, clear, precise and, in all relevant instances, supported by appropriate reference to the supportive evidence. They will not be repeated here, although we shall refer to them as we discuss the points that follow.

BASIC LEGAL BACKGROUND OF CONTROVERSY

The principles governing the apportionment of subsurface resources between a littoral state and the United States have been established in a series of United States Supreme Court decisions, known informally as the tideland (or submerged land) cases. Since they are well summarized in the lower court's Opinion (pp. 2-6, incl.) and not seriously contested here, Appellee will attempt only a brief summary at this point. Our objective, of course, is to demonstrate the significance of the controlling evidence which we hereinafter discuss.

In response to the first tidelands decision, *United States v. California,* 332 U.S. 19 (1947), vesting exclusive title in the United States to the subsurface resources beneath the three mile territorial sea, Congress enacted the Submerged Land Act of 1953. Through this Act, Congress granted to coastal states (including, subsequently, Alaska upon reaching Statehood) exclusive rights to subsurface resources located beneath the water area identical to the territorial sea. It also granted identical rights to the subsurface resources located beneath inland waters. Since the term "inland waters" was not defined in the Act, it

was left to the Supreme Court in the second California decision, *United States v. California,* 381 U.S. 139 (1965), to give meaningful and judicial interpretation to the term. The court adopted the definition of inland waters set forth in terms of international law in the Convention of the Territorial Seas and the Contiguous Zone. (T.I.A.S. No. 5639).

The rule concerning juridical bays, found in Article 7 of the Convention, is not applicable to Cook Inlet,[3] and Alaska does not contend that Cook Inlet is a juridical inland bay. Paragraph 6 of Article 7 of the Convention, however, states that "the foregoing provision shall not apply to so-called 'historic' bays. . ."

Thus the lower court came to the crux of this controversy. It analyzed the problem as follows:

> "If lower Cook Inlet is an historic bay within the meaning of the Convention, that body of water is thus inland water within the meaning of the Submerged Lands Act, with the result that the State of Alaska would have exclusive rights to the subsurface resources." (P. 3, Opinion).

The parties are agreed that there are three requirements. These have been set forth and defined in an exhaustive study recommended by the International Law Commission under the auspices of the United Nations. *Juridical Regime of Historic Waters, Including Historic Bays (Juridical Regime)* (App. p. 10A, Appellant's Brief).

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3. One of the requirements for a juridical inland bay is that the distance between the natural entrance points must not exceed twenty-four miles. The distance between these points in Cook Inlet is approximately forty-seven miles.

The three requirements, approved by the United States Supreme Court, in *United States v. Louisiana,* 394 U.S. 11, 23 (1969), are (1) the exercise of authority over the area by the state claiming the historic right; (2) the continuity of this exercise of authority; and (3) the attitude of foreign states.[4]

We are now in a position to discuss the lower court's Findings and the supporting evidence.

PART ONE

I.

THE DISTRICT COURT CORRECTLY FOUND UPON UNCONTRADICTED AND AMPLE EVIDENCE THAT SOVEREIGNTY HAS BEEN AND WAS EXERCISED OVER COOK INLET.

A. Geographic and Economic Characteristics of Cook Inlet.

Among those water areas dealt with in the tideland cases, Cook Inlet is unique. As a clearly defined, well-marked indentation, Cook Inlet is completely surrounded by the lands of Alaska so that it contains landlocked waters and geographically resembles a large inland lake. (Findings 1-8, incl.; R. 3778-3779).[5] It is well marked

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4. For a more complete statement of the requirements, see the lower court's Opinion quoting the *Juridical Regime*. Note also the modifications of those requirements in the context of a domestic dispute between state and federal governments. (Pp. 4-6, Opinion).

5. When, hereinafter, reference is made to particular Findings, the Court's attention is also invited to the supporting evidence cited in the Finding itself. Therefore, reference to such evidence is sometimes omitted in Appellee's brief.

by prominent headlands inside of which, so the undisputed evidence showed, a mariner instinctively feels himself within the jurisdiction and domain of Alaska. (Finding 11; R. 3779-3780).[6] From the beginning of recorded history, according to the testimony of three other distinguished experts,[7] Cook Inlet has been vital to the economic interest and well-being of those persons inhabiting its shores; first, because of the fur trade, then fishing, and more recently, mining and petroleum activity. It has never been a waterway for intercourse between nations, but, on the contrary, all of Cook Inlet's waters have been and are such that at all times they have been easily patrolled and protected by the government entity which controlled its shores. (Finding 13; R. 3780).

While these facts clearly distinguish Cook Inlet from those waters involved in other submerged lands cases, Alaska does not contend that standing alone they are sufficient to satisfy the three controlling criteria for the establishment of an historic bay. But neither are these facts irrelevant. They led the trial court to find—and properly so—that the geographic and economic chacteristics of Cook Inlet are such that it would have been un-

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6. Mitchel P. Strohl, currently the registrar and lecturer in political science at the American College in Paris, France, and formerly a Commander in the United States Navy, retiring after 22 years of active service, testified as follows:

"Q. All right, Professor, would you state what the reasons are for your opinion [that Cook Inlet is a necessarily inland body of water]?

A. I think, sir, that these fall into about six categories: The configuration of the shore; secondly, the concept of a landlocked body; third, the matter of entry, then the category of tides; fifth, this would be the weather, and finally, the navigation aids, I think about in that order." (Tr. 465).

7. Two historians and an economist. *Infra.*

natural had not the inhabitants of its shores, with the acquiescence of foreign nations, exercised continuous sovereignty over its shores and waters from the earliest times forward. (Finding 4, R. 3778). And the Court further found, upon ample evidence that, had not the Cook Inlet fisheries been so controlled, the citizens of the United States and Alaska would have suffered disastrous effects through the loss and dissipation of these valuable fisheries. (Finding 14, R. 3780).

B. Exercise of Russian Sovereignty.

Now, turning to the heart of this controversy—history—the Court found that from an historic standpoint all of Cook Inlet fell under exclusive Russian dominion by the early 1800's. Two distinguished historians, Mr. Robert DeArmond and Dr. William Hunt, testified at length concerning the precise nature and acts of Russian sovereignty, as well as subsequent acts of sovereignty exercised by the United States. (DeArmond testimony, Tr. 520-570; Hunt testimony, Tr. 474-518).

Russia which had earlier established at least four settlements on the shores of Cook Inlet recognized the importance of Cook Inlet's fisheries in 1821. Emperor Alexander then issued an edict (Ukase) which granted exclusively to Russian subjects the pursuits of commerce and fishery along the entire northern coast of North America, including Cook Inlet. The edict which forbade foreign vessels from approaching within 100 Italian miles of the coast was never questioned or held ineffective as to Cook Inlet. (Exhibits W, X, Y; Findings 17-19, 21; R. 3781-2). Even before then, Russian dominion over Cook Inlet was demonstrated by a traditional assertion of authority when in 1786 an attempt by the Englishman, Portlock, to en-

ter Cook Inlet drew a Russian fur trader's cannon fire. (Finding 20; R. 3781-2).

C. Exercise of Sovereignty by the United States.

The rights of Russia as to jurisdiction and its sovereignty in Cook Inlet passed unimpaired to the United States at the time of the Treaty of Cession in 1867. (Finding 22; R. 3782). The United States thereafter accelerated and augmented the exercise of sovereignty over all of Cook Inlet. The principal area of United States' concern was in the management and control of Cook Inlet's fisheries so as to avoid their dissipation and consequent economic disaster to American citizens.

The fact of United States' jurisdiction over all of Cook Inlet was first determined judicially when the United States District Court for the District of Alaska upon the urging of the Justice Department held that the arrest of the vessel KODIAK was an assertion by the United States of territorial jurisdiction over Cook Inlet. (*The KODIAK*, 53 Fed. 126 (1892)). The Revenue Cutter MOHICAN arrested the KODIAK and two other vessels, the LETTIE and JENNIE for alleged violations of R.S. 1956 which prohibited the taking of sea otter in United States waters. The Court's decision was well publicized, both in newspapers and official reports; and the then Attorney General of the United States, expressly informed of the decision, obviously agreed with the decision and the action taken. The decision of the District Court in the *KODIAK* case was adhered to the following year when two vessels, the OLGA and MARY ANDERSON were arrested for alleged similar violations in the disputed area of Cook Inlet. (Findings 23-30; R. 3782-3783).

1. *The Alien Fishing Act.* The arrests of the KODIAK, LETTIE, JENNIE, OLGA and MARY ANDERSON in Cook Inlet set the stage in 1906 for the passage of an "Act Prohibiting Fishing by Aliens in the Waters of Alaska," hereinafter referred to as the Alien Fishing Act. This Act prohibited aliens from fishing in the waters of Alaska under the jurisdiction of the United States. There can be no doubt that the earlier arrests demonstrated that the waters of all of Cook Inlet were waters under the jurisdiction of the United States subject to the Alien Fishing Act and therefore waters from which aliens were excluded. Subsequent to the passage of the Alien Fishing Act and up through the time of Alaska Statehood when the State of Alaska assumed control of Alaska's fisheries, all waters of Cook Inlet inside a line drawn from Point Gore through the Barren Islands to Cape Douglas, as well as the adjacent territorial sea, were patrolled for the purpose of enforcing the Alien Fishing Act. Thus, the effect of the Act was to exclude aliens both from fishing within the inland waters of Cook Inlet inside a line drawn from Point Gore to Cape Douglas, and from fishing within the territorial sea three miles seaward of that line. (Findings 31-34; R. 3783-3784).

2. *Southwestern Alaska Fisheries Reservation.* The intensity of sovereignty exercised by the United States over Cook Inlet increased in direct proportion to the increased concern of the United States over Cook Inlet's fisheries. Hence, the geographic area of Alaska in which Cook Inlet is located was singled out for special treatment in 1922. In that year President Harding, by Executive Order, created the Southwestern Alaska Fisheries Reservation. The regulations under that Order defined the Cook Inlet area as that area ". . . north of the latitude of Cape

Douglas . . . including the Barren Islands . . . and *all* the shores and *waters* of Cook Inlet." [Emphasis supplied] As to those waters, the Presidential Order admonished:

> "Warning is hereby given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

That warning struck home on May 27, 1924 when two American halibut vessels, the ZAPORA and NEW ENGLAND were arrested and boarded for fishing in the disputed area of Cook Inlet without first obtaining the required authority. Clearly from the period beginning in 1892 to the ZAPORA and NEW ENGLAND boardings in 1924, the United States had treated all of Cook Inlet's waters as its own and had exercised its exclusive sovereignty therein. (Findings 35-39; R. 3784-3785).[8]

3. *The White Act.* In 1924 Congress passed the "Act for Protection of the Fisheries of Alaska and for Other Purposes" (hereinafter referred to as the White Act), 43 Stat. 464. That Act, which was passed in response to a severe menace to Alaska's fish resources (Ex. AK, pp. 2-11), was the successful culmination of the United States' efforts in achieving complete and exclusive sovereignty over Cook Inlet. The Secretary of Commerce and later the Secretary of the Interior were given authority to "set apart and reserve fishing areas in any of the waters over which the United States has jurisdiction." Here again the Executive Branch of the Government was called upon to determine whether or not all of the waters of Cook Inlet

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8. A complete discussion of the evidence pertaining to the KODIAK arrests, the Alien Fishing Act and the Southwestern Alaska Fisheries Reservation appears in Alaska's post trial brief, pp. 16-24 (R. 3614-3622).

were included within "the waters of Alaska over which the United States has jurisdiction." Again, the United States acted clearly and unmistakably.

The Secretary of Commerce and later the Secretary of the Interior, from 1924 to 1959, a period of 35 years, defined the waters over which the United States has jurisdiction ". . . *to include Cook Inlet,* its tributary waters and all adjoining waters north of Cape Douglas and west of Point Gore. The Barren Islands are included." (Emphasis supplied). (Laws and Regulations for the Protection of Fisheries of Alaska, Department of Commerce, December, 1924; Ex. IU; Findings 42, 44; R. 3786).

The United States has argued that this regulation should be narrowly construed and that all the waters of Cook Inlet should not be included, but only the "territorial and coastal" waters extending 3 miles from the shoreline of Cook Inlet. As we see it, this is an unnecessarily narrow and twisted interpretation of the regulation and unsupported by other uncontradicted evidence. For instance, other areas in Alaska such as Bristol Bay were defined to include "territorial, coastal and tributary waters." The absence of the words "territorial and coastal waters" in the definition of Cook Inlet, contrasted with the inclusion of the words "to include Cook Inlet . . . and all adjoining waters north of Cape Douglas, etc." makes unmistakably clear the meaning of the regulation in question and extended jurisdiction over all of the waters of Cook Inlet. (Finding 44; R. 3786).[9] In the light of the federal statutes

9. Other strong evidence that Cook Inlet was treated as the inland waters of the United States is the fact that the Point Gore-Cape Douglas line defined in the White Act regulations was used as the baseline for the measurement of the territorial sea for purposes of fisheries regulation. That is to say, the three mile limit or the baseline for the measurement of the territorial sea in Cook Inlet was

and regulations, consider also that the trial judge had before him the unrefuted testimony of numerous witnesses that agents and officials of the United States Bureau of Fisheries and its successor agencies regularly and continuously patrolled the whole of Cook Inlet area as defined in the regulations. Those witnesses, whom the lower court found to be credible, testified that the purpose of those patrols was, of course, to enforce the White Act and the Alien Fishing Act.[10]

The lower court had no alternative but to find that these enforcement efforts were open and apparent. And the success with which the enforcement was carried out and the extent of its notoriety is shown by the fact that except for a few isolated Canadian halibut fishermen, no foreigners fished in or attempted to fish in Cook Inlet.[11] Moreover, the evidence clearly showed that when the occasion arose, in addition to numerous boardings[12] in the disputed area, those found in violation of the laws were arrested and where necessary, their vessels and gear were

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measured from that line, not from the shoreline of Cook Inlet. Moreover, as the Court found, there was and is no doubt that the White Act and its regulations were applied to waters within the boundaries of the three mile limit only, including, of course, inland waters. (Ex. CR, EK, EF, EJ, EL, EI, AZ, p. 81; Finding 43; R. 3786).

10. See *Skiriotes v. Florida*, 313 U.S. 69 (1941). The White Act, unlike the Florida statute in the *Skiriotes* case was by its terms limited in application to waters of Alaska over which the United States had jurisdiction.

11. The exclusivity of the American fishery in Cook Inlet was recognized when in October of 1930 the Commissioner of Commerce ordered certain charts destroyed which depicted portions of Cook Inlet as high seas. This was done to prevent foreigners from encroaching upon an exclusive American fishery. (Finding 57; R. 3790).

12. A high ranking United States official testified that such boardings are acts of enforcement and constitute a serious occasion. (Baltzo testimony, Tr. 176).

confiscated.[13] (Findings 40-57; R. 3786-3790; see particularly Findings 46-56; R. 3787-3790).

4. *The Gharrett-Scudder Line.* One of the United States' most significant assertions of authority over all of Cook Inlet took place in 1957 and 1958 when the United States communicated to Canada, in a classic manner, its claim to Cook Inlet. In order to delineate the waters of Alaska from the high seas, in 1957 the Department of the Interior promulgated a regulation defining the waters of Alaska as all those waters north and west of the international boundary at Dixon Entrance extending ". . . 3 miles seaward (1) from the coast, (2) *from lines extending from headland to headland across all bays, inlets, straits, passes, sounds, and entrances.*" (50 C.F.R. §101.19 (1957)). (Emphasis added). In 1957 Canada and the United States also proposed the prohibition of the taking of salmon with nets from the high seas. Because of this proposal Canada requested the United States to furnish it charts depicting the location of the line described in the above-quoted regulation. Since the regulation was clear on its face, the United States could have declined to send the charts, thus avoiding the necessity of having to enter into a potential dispute with Canada over the location of the waters of

13. The United States argues that since most of the charges which formed the basis of the arrests were dismissed, there was no exercise of authority. However, any dismissals were in all instances based upon a failure to prove the merits of the charge and not based upon a lack of jurisdiction. The United States has grossly misread *U. S. v. California*, 381 U.S. 139 (1965) in arguing that the dismissal of *U. S. v. Carillo*, 13 F.Supp. 121 (1935) derogates from Alaska's claim of sovereignty in this case. In *Carillo* a Federal charge was dismissed for want of federal jurisdiction beyond the three mile limit. This is vastly different from a dismissal of charges on the merits of the criminal complaint.

Alaska. Nevertheless, the United States on or about October 15, 1957, sent to the Canadian Government charts depicting the line, thereafter known as the Gharrett-Scudder line. The Gharrett-Scudder line, which was depicted as the baseline for the measurement of the territorial sea for fishery regulation, enclosed as inland waters all of the disputed area of Cook Inlet. As will be shown hereunder, Canada did not contest or oppose the claim made to Cook Inlet. (Findings 58-63; R. 3791-3792). The Gharrett-Scudder line and the regulations upon which it was based confirm as of the date of Alaska Statehood the status of Cook Inlet as inland waters of the United States.

Judge von der Heydt best expressed the only conclusion to be derived from the foregoing evidence. He found with respect to the vast amount of federal activity in all of Cook Inlet year after year that "[t]he State of Alaska has produced evidence which establishes clear beyond doubt that there has been such sufficient exercise of authority over lower Cook Inlet." (Pp. 7-8, Opinion). Indeed, by way of summary he stated: "These were deeds—and not merely proclamations—by which the intent of the United States to exercise sovereignty was clearly expressed." (Finding 47; R. 3788).[14]

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14. The United States argues that the exercise of authority heretofore demonstrated is rendered ineffectual by *Island Airlines v. C.A.B.*, 352 F.2d 735 (9th Cir. 1965) and by the Master's Report in *U. S. v. California*, 332 U.S. 19 (1947) (Ex. 49). Suffice it to say the water areas involved in those cases were vastly different from the landlocked waters here presented, and the proof presented by each State was virtually non-existent.

D. Exercise of Sovereignty by the State of Alaska.

The District Court found on the basis of undisputed evidence that after the State of Alaska took over control of its commercial fisheries on January 1, 1960, it asserted continuous authority over the fisheries in Cook Inlet in the same manner as done by the United States since the arrest of the KODIAK in 1892. The State continued in effect substantially the same definition of the Cook Inlet area and distributed regulations containing that definition to authorities of the United States and representatives of Japan, Canada and other foreign nations. No objection was ever received concerning the definition. The Court found that officials of the State have regularly and continuously patrolled all of Cook Inlet for the purpose of enforcing State fishing laws, and that when violations of the laws occurred, arrests were made.[15] (Findings 64-72; R. 3792-3794).

The vigor with which Alaska pursued its claim to Cook Inlet is perhaps nowhere better demonstrated than in the Shelikof Strait incident, an incident which the Court characterized as the clearest exercise of sovereignty by the State. On or about April 15, 1962, Alaskan fishery enforcement officials arrested three Japanese fishing vessels, one of which was more than three miles from shore in Shelikof Strait.[16] The arrest was one event in a series of events involving the Japanese with Cook Inlet.

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15. Arrests were made of nonresidents as well as residents. (Findings 71-72; R. 3794).

16. The location of at least one vessel more than three miles from shore is undisputed and uncontradicted in the record. See testimony of Governor William A. Egan (Tr. 729, 764).

A Japanese fishing vessel, BANSHU MARU, and two other fishing vessels, had intruded into the southernmost part of lower Cook Inlet near the Barren Islands and then immediately proceeded into the nearby waters of Shelikof Strait. Having been forewarned that such Japanese fishing vessels intended to intrude into the waters of Cook Inlet to establish historic Japanese fishing rights therein, the Governor of Alaska, after seeking in vain to obtain immediate action by our State Department,[17] authorized the arrest of three Japanese vessel captains and the boarding of two Japanese fishing vessels, at least one of which was more than 3 miles from Alaska's shore. The Court has dealt at length with this incident in its Findings of Fact. (Findings 73-85, incl.; R. 3794-3797). These Findings need not be repeated here. It is significant to note, however, that they are not in dispute and show clearly beyond doubt the most vivid exercise of sovereignty against foreigners. There was evidence that, with the knowledge of the Government of Japan[18] (notwithstanding its subsequent protest), the Japanese fishing company agreed in writing with Alaska thereafter not to fish in any part of the disputed area of Cook Inlet. Since then no such fishing by any Japanese citizen or vessel has taken place in Cook Inlet, although fishing has subsequently occurred elsewhere in the vicinity of Alaska.

The United States itself, even though given the opportunity to do so, did not dispute Alaska's action in

17. On a prior occasion, the United States informed Alaska that in cases of foreign fishing in Alaskan waters, the State should take appropriate action itself. (Finding 76; R. 3795).

18. (Ishimura testimony, Tr. 273) "Q. Mr. Ishimura, you were then aware, were you not, that the Japanese Government was consulted by your company about this agreement. . . ? A. Of course, yes . . ."

claiming Cook Inlet. On May 3, 1962 the Japanese Government protested to the United States the arrests and boardings in Shelikof Strait. However, the official reply of the United States, contrary to a suggestion made by a lawyer for the State Department, did not state that either Cook Inlet or Shelikof Strait was inland waters. To the contrary, the United States' reply said that the matter included questions of fact and law for the courts, presumably questions of law and fact similar to the case at bar. The incident closed by a statement by the President of the United States to the Governor of Alaska that Alaska did the right thing in seizing the Japanese vessels and enforcing Alaska's jurisdiction. (Findings 73-85; R. 3794-3797).

There can be no doubt, as demonstrated above, that the District Court correctly found that the United States and Alaska have consistently exercised authority over all the waters of Cook Inlet landward of the line joining Point Gore, Cape Douglas and the Barren Islands. The evidence on the issue of sovereignty is unrefuted, uncontradicted, and clearly not conflicting. For that reason, the Court's Findings and Conclusions on the issue of sovereignty must be upheld.

Argument

The lower court concluded, and Appellant does not disagree, that the authority which a nation must exercise over bays in order to be able to claim them as historic waters is *sovereignty*. *Juridical Regime* 80. This brings us to the fundamental question as to what kind of acts constitute evidence of sovereignty. There is also the problem as to whether the acts, upon which the lower court relied, were legally sufficient to prove sovereignty.

Appellant contends here, as it did in the lower court, that the requisite exercise of authority or sovereignty must consist of acts directed at foreign nations. So Appellant points out, and correctly so, that most of the arrests and enforcement activities involved American citizens and not alien fishermen. Hence it argues that Alaska's evidence proved nothing and was wholly irrelevant.

Appellant's argument is ineffectual and faulty in several respects. Let us consider, *firstly,* the almost total absence over the years of foreigners in Cook Inlet. Recognizing that sovereignty must be effectively exercised by deeds and not merely by proclamations, the writers of the *Juridical Regime* stated:

> "This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken." *Juridical Regime* 99.

The lower court, we contend, acted properly in taking into account the absence of foreign vessels in Cook Inlet over a vast period of time. The Court also properly relied upon the testimony of law enforcement officials who testified that, had they discovered foreign fishing or trespassing in Cook Inlet, they would have acted in such a way as to maintain authority over lower Cook Inlet.

(e.g. Roberts testimony, Tr. 329; Studdert dep. pp. 21-24).

Secondly, Appellant's argument is invalid because it overlooks the undisputed evidence that there was indeed enforcement activity and the exercise of United States and Alaska sovereignty against *foreigners.*

There is no need to reiterate the undisputed evidence, but it may be recalled that sovereignty was asserted against Japanese fishermen (through the seizure of the BANSHU MARU); the submission of the Gharrett-Scudder line to the Canadian Government and its apparent acceptance thereof; the wide publication and distribution throughout much of the world of federal laws and regulations banning aliens from fishing in Cook Inlet (the Alien Fishing Act); the openness, notoriety and continuity of both federal and state patrols that had continued uninterruptedly since 1906 and since the enactment of the White Act; and in the face of all of this, the complete absence of any type of protest (except the repudiated Japanese note) by any foreign nation against the continued exercise of sovereignty over Cook Inlet.

Finally, Appellant, we believe, has ignored significant portions of the *Juridical Regime,* which is attached as an Appendix to its brief. In discussing the kind of authoritative acts which a state must exercise, the authors of the *Juridical Regime* made the following statement, peculiarly applicable to the facts of the present case:

> "Suppose . . . that the State has continuously asserted that its citizens had the exclusive right to fish in the area, and had, in accordance with this assertion, kept foreign fishermen away from the area or taken action

against them. In that case the State in fact exercised sovereignty over the area, and its claim, on a historical basis, that it had the right to continue to do so would be a claim to the area as its 'historic waters'. The authority exercised by the State would be commensurate to the claim and would form a valid basis for the claim (without prejudice to the condition that the other requirements for the title must also be fulfilled)." *Juridical Regime* 86.

The author went on to quote the opinions of prominent and internationally recognized writers on the subject and to refer to international conventions and arbitrations. One writer, Gidel, in discussing the acts by which authority is exercised, stated:

"It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence: the exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent. It would, however, be too strict to insist that only such acts constitute evidence. In the Grisbadarna dispute between Sweden and Norway, the judgment of 23 October 1909 mentions that 'Sweden has performed various acts . . . owing to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty.' " *Juridical Regime* 89.

Bourquin, another writer, agreed and stated:

"What acts under municipal law can be cited as expressing its desire to act as the sovereign? That is

> a matter very difficult, if not impossible, to determine *a priori*. There are some acts which are manifestly not open to any misunderstanding in this regard. The State which forbids foreign ships to penetrate the bay or to fish therein indisputably demonstrates by such action its desire to act as the sovereign." *Juridical Regime* 90.

In the *Fisheries* case, *United Kingdom v. Norway*, Judgment of 18 December, 1951, Norway stated in its Counter-Memorial:

> "It cannot seriously be questioned that, in the application of the theory of historic waters, acts under minicipal [sic] law on the part of the coastal State are of the essence. Such acts are implicit in an historic title. It is the exercise of sovereignty that lies at the basis of the title. It is the peaceful and continuous exercise thereof over a prolonged period that assumes an international significance and becomes one of the elements of the international juridical order." *Juridical Regime* 93.

Clearly Alaska's evidence meets the test set forth in the above-quoted portion of the *Juridical Regime*, an authority admitted by the United States to be controlling in this case.

With regard to the arrest of the Japanese fishermen and the seizure of their vessels, Appellant has pointed out—and again factually correctly—that this incident involved only the action of State officials who, as opposed to federal officials, have no responsibility for the conduct of foreign relations. Hence the argument is that State acts are irrelevant in proving the exercise of sovereignty over Cook Inlet. The United States Supreme Court answered this argument in *United States v. Louisiana, supra.* There it was held (394 U.S. at 77) that a controversy such as

this between the federal and state governments should be viewed as if the claim (of the State of Alaska) was being made by the United States opposed by another nation. With this premise, the Court then made clear that State exercise of sovereignty, as distinguished from federal assertions of sovereignty, may properly be considered on the issue of sovereignty and historic title. So we contend the lower court acted with complete propriety—and indeed had no alternative but to consider the actions of state officials in unmistakably preventing the Japanese from acquiring any rights in Cook Inlet.

Appellant further argues, however, that the seizure of Japanese vessels in *Shelikof Strait* is not evidence of an intent to claim *Cook Inlet*. But here again Appellant falls into the error of considering only a portion of the evidence and ignoring other relevant proof. Granted that the arrests were made in Shelikof Strait rather than in Cook Inlet, the evidence is that the Japanese vessels had just left Cook Inlet and were not apprehended until they had entered Shelikof Strait. The Japanese were charged with violating the waters of Cook Inlet (as well as Shelikof Strait) and agreed, with the knowledge of the Japanese Government, that they would not again intrude into the waters of *Cook Inlet*.[19] Thus the undisputed evidence is that, although the arrests occurred in Shelikof Strait, the gravamen of the offense and the assertion of the right to exclude the Japanese involved Cook Inlet (Findings 73-80; R. 3794-3796).

Appellant has also overlooked the evidence that Alaska enforcement officials have arrested non-citizens of Alaska.

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19. See paragraph 2 of the Agreement (Ex. IV) wherein a line is described and defines an area, including Cook Inlet, wherein the Japanese agreed not to fish thereafter.

(Findings 71-72; R. 3794). This exercise of sovereignty was and could have been valid only on the basis of territorial jurisdiction by the State—the legitimate enforcement of municipal laws.

II.

THE DISTRICT COURT CORRECTLY FOUND, UPON UNCONTRADICTED AND AMPLE EVIDENCE, THAT THERE HAS BEEN A CONTINUATION OF THE EXERCISE OF SOVEREIGNTY OVER COOK INLET FOR SUCH PERIOD OF TIME AS TO HAVE DEVELOPED INTO A USAGE.

As the above evidence demonstrates clearly beyond doubt, there has been a continuous exercise of sovereignty —first by Russia from at least 1821 through 1867, then by the United States from at least 1906 and possibly earlier, and more recently by the State of Alaska from 1959 to the present. Hence there has been an exercise of authority over Cook Inlet by American citizens, acting through their state and national governments for more than sixty-six years. The legislative enactments and federal regulations of the United States concerning the disputed areas have been applied consistently and without interruption for a sufficient time to give rise to a usage by the United States and its successor, the State of Alaska, over the disputed waters. (Findings 86-91, incl.; R. 3797-3798).

Here again the testimony of two recognized and distinguished experts, DeArmond and Hunt, supplemented and buttressed the evidence hereinabove referred to in

the trial court's Findings of Fact. The Findings are not erroneous, and in fact they are largely undisputed.

Dr. William Hunt, then Chairman of the History Department of the University of Alaska, after having qualified as an expert witness, testified as follows:

> "Q. Now, based on your training, experience, and those studies, do you have an opinion as to whether or not there has been a historical exercise of authority over Cook Inlet by those people who have inhabited its shores?
> A. Yes, sir, I have.
> Q. What is that opinion?
> [Tr. 479-480]
> * * *
> The Witness: Sir, my opinion is that there has been a historical exercise of control over Cook Inlet and its shores.
> * * *
> Q. Do you have an opinion, Dr. Hunt, based upon your training, experience, and those studies as to whether from a historical standpoint there has been such continuity of this exercise of authority as to have developed into a usage?
> A. Yes, sir.
> Q. What is that opinion, sir?
> A. I believe there has been such a continued exercise of authority as to have ripened into a usage."
> [Tr. 483].

He proceeded at length to give factual reasons in support of these conclusions. (Tr. 482-508). Similar testimony was given by Robert DeArmond, an expert witness in matters pertaining to research of the history of Alaska. (Tr. 520-560).

Argument

It is clear that the "exercise of authority [must be] continued for a time sufficient to confer upon it the quality of usage." *Juridical Regime* 100. While it is clear that no precise length of time is necessary to create a usage on which historic title is based, "the State must have kept up its exercise of sovereignty over the area for a considerable time." *Juridical Regime* 103.[20]

Applying this principle to the facts at hand, the Court held, as demonstrated by the evidence summarized above, that the exercise of authority over lower Cook Inlet "has existed without interruption from 1906, and very possibly earlier, until the time this dispute arose." (Op. p. 10).

III.

THE TRIAL COURT CORRECTLY FOUND, UPON AMPLE AND LARGELY UNREFUTED EVIDENCE, THAT FOREIGN NATIONS HAVE ACQUIESCED IN THE EXERCISE OF SOVEREIGNTY OVER COOK INLET.

The detailed Findings of the District Court are based upon voluminous factual evidence that foreign nations have acquiesced in the exercise of sovereignty over Cook Inlet by those nations controlling its shores and are clearly not erroneous. (Findings 92-102; R. 3798-3800).

The District Court found that no nation protested Russia's exercise of exclusive dominion over Cook Inlet. Likewise, it found that no nation protested the United States' enforcement of the Alien Fishing Act, the South-

20. Where the term "State" is used by the author, there is meant a national sovereignty or government as distinguished from an internal State or subdivision of a nation.

western Alaska Fisheries Reservation, or the White Act over all of Cook Inlet. In fact, as to Cook Inlet, Canada accepted the placement of the Gharrett-Scudder line which included all of the disputed area of Cook Inlet as inland waters of the United States, not high seas. If, at any time in the entire history of Russian, United States and Alaskan sovereignty over Cook Inlet it was appropriate for a foreign nation to protest the United States' claim, it was in October 1957 when Canada received the charts depicting the Gharrett-Scudder line (Ex. IE 6). Canada neither said nor did anything.[21]

The District Court found that the presence of a few Canadian halibut fishermen did not constitute effective opposition by Canada to the United States' and Alaska's historic claim to Cook Inlet. The argument of the United States to the contrary has no merit since, first of all, acts of individual citizens do not constitute opposition of a government, particularly when so few in number.[22] In addition, the District Court found that the number of Canadian halibut vessels was so small as to be *de minimis*. After carefully considering the United States' evidence on the issue, the Court found that although the United States had made an exhaustive study of its records, it had been able to offer evidence—inconclusive and undisputed—which if believed would show there were possibly only two undetected occurrences of Canadian halibut fishing in Cook Inlet before Alaska Statehood, and that thereafter

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21. A complete analysis of the evidence on the Gharrett-Scudder line and its significance appears in Alaska's post trial brief, R. 3666-3676.

22. Those acts which determine the status of an area as an historic bay must emanate from the sovereign, not private individuals. *Juridical Regime* 95.

only five Canadian vessels fished for halibut in the Inlet, none of which were detected by State enforcement officials. The testimony of numerous witnesses is clear that had the vessels been detected, they would have been arrested.[23]

Moreover, the Court found that at least one Canadian vessel fished unmolested within what even the United States admits to be the territorial sea of Cook Inlet, that is, within three miles from shore.[24] (Finding 100; R. 3799).

In addition to the foregoing, the District Court considered other factors which reinforce its Finding that the presence of a few Canadian halibut vessels was not controlling on the issue of Cook Inlet's status as an historic bay.

First, the Court recognized that historic title to the disputed area had already ripened. Since most of the intrusions took place after the commencement of this suit and by that time the United States had engaged in all of the activity described in the Findings, the Court was clearly correct in deciding that historic title to Cook Inlet had already ripened in the United States and Alaska.

Second, the evidence showed and the Court found that in the event of a real challenge to American fishery jurisdiction in the disputed area, such as foreign fishing for

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23. Typical of the testimony on the point is that of Donald W. Roberts, Agent in charge of the Cook Inlet Fisheries for enforcement purposes in 1954. Mr. Roberts testified in response to a question concerning the presence of Canadian halibut fishermen in Cook Inlet ". . . If there had been any vessels in Cook Inlet as described by the regulations, we would have apprehended them because it prohibited the taking of fish from this area by foreign vessels." (Tr. 320) However, Mr. Roberts earlier testified he was unaware of a Canadian halibut fishery in Cook Inlet. (Tr. 319).

24. The United States points out that foreign fishing is prohibited in the territorial sea. (United States' Brief, p. 16).

salmon, the United States would have been quick to take enforcement action.

Third, the Court found on the basis of undisputed evidence that there existed traditional ties of friendship between the United States and Canada. This factor, which is closely related to that of consent, recognized the past close relations between the two countries.[25] As an example of the close relationship existing between Canada and the United States, the District Court referred to the 1970 United States-Canada Reciprocal Fishing Agreement (Exhibit "R").[26] The Court did not find that by virtue of that agreement Canadians had the right to fish for halibut in Cook Inlet.[27] If the Opinion left any doubt about what the Court ruled, the Findings of Fact make the point clear. In Finding 101(e) the Court simply noted that traditional ties of friendship were a factor supporting the finding that the number of Canadian halibut vessels in Cook Inlet were so small as to be *de minimis.*[28] (R. 3800) (Findings 100-102; R. 3799-3800).

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25. An indication of this attitude is a letter from the Warden of the Bureau of Fisheries, Ketchikan Office, to the Bureau in Juneau, dated August 8, 1937, wherein the Warden wrote: "Release boats Stop Our Policy to be lenient with Canadian boats fishing halibut close to boundary." (Ex. "DZ").

26. That agreement was merely one in a long line of agreements between the United States and Canada dating back to 1782. (Ex. "BY").

27. For that reason, the argument of the United States at pp. 40-41 of its brief misses the Court's point. The consent given to fish in Cook Inlet, of course, was not formalized in the reciprocal agreement.

28. In the course of its argument and going outside the record, the United States refers to an event allegedly occurring subsequent to the District Court's decision. The United States apparently is relying on an alleged protest by Canada to threatened state exercise of authority over the disputed area (see footnote 12, p. 41 Appellant's brief). In relying on this event, subsequent to the judgment of the District Court, the United States is in direct violation of the opinion

The second nation most likely to be interested in Cook Inlet's Fisheries, Japan, has likewise acquiesced in the historic claim of the United States and Alaska to Cook Inlet. Again, based upon its analysis of numerous exhibits and lengthy testimony, the Court found that after the arrest of Japanese citizens and vessels in Shelikof Strait, the Japanese fishing company with the consent of the Japanese Government agreed with Alaska not to fish in Cook Inlet. (Finding 78; R. 3795-3796). Significantly the Court found that even though Japan later protested the action of Alaska in making the arrests, and even though Alaska has continued to claim the disputed area by exercising sovereignty thereover, no Japanese vessel has fished in any part of Cook Inlet. (Finding 79; R. 3796). Clearly, Japan's actions speak louder than its words. No conclusion is possible other than that Japan has acquiesced in the claim of the United States and Alaska to Cook Inlet.[29]

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of the United States Supreme Court in *U. S. v. Louisiana*, 394 U.S. 11, 78, wherein the Court stated:

> "It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing a straight baseline. It would be quite another to allow the United States to prevent recognition because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California*." (Emphasis, the Court's).

Moreover, reference to the incident is irrelevant. The *Juridical Regime* states at 121:

> "After a State has exercised sovereignty over a maritime area during a considerable time under general toleration by the foreign States, and an historic right to the area has thus emerged, it is not possible for one or more States to reverse the process by coming forward with a protest against the already accomplished fact."

29. The Japanese protest has been rendered ineffective by continued Alaskan sovereignty over the disputed area and by the lack of

Lastly, with rare exceptions there has been no foreign fishing in the disputed area of Cook Inlet. As shown earlier, the District Court found that there were only two clear instances of Canadian vessels fishing for halibut in Cook Inlet in the 94 years of American domination over Cook Inlet before Statehood. There were no other foreign fishing vessels in the disputed area during that period. The lack of such foreign fishing activity in an area, which was so clearly the subject of regulation and control by the United States, clearly demonstrates foreign acceptance and recognition of that control.[30] (Finding 102; R. 3800).

Argument

The attitude of foreign nations, the last of the three factors to be considered in determining whether a nation has acquired historic title to a maritime area, has been described both as "acquiescence", and "toleration". *Juridical Regime* 106 and 109. For purposes of this case the distinction between the two terms is unimportant since the lower court applied the higher standard and found that "the community of nations has acquiesced in the emergence of historic title of lower Cook Inlet." (Op. p. 11). The *Juridical Regime* quotes with approval an expert in the

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Japanese opposition. The *Juridical Regime* 115 makes this clear: "Should despite the protest, the coastal State continue to exercise its sovereignty over the area, the opposition on the part of the foreign nation must be maintained by renewed protests or some equivalent action."

30. The laws and regulations governing the fisheries of the Cook Inlet area including the disputed area were published and were, of course, public records, (Ex. IU, IX1-IX12) from at least 1924 onward. Moreover, the District Court found that the United States' and Alaska's claims to the disputed area of Cook Inlet were open and notorious. (Findings 64-66; 98; R. 3792-3793; 3799). See *Juridical Regime* 128-130.

international law of bays, Bourquin, who supports the theory that the attitude required of foreign nations is that of acquiescence:

> "In such cases the question to be asked is not whether the other States consented to the claims of the coastal State but whether they interfered with the action of that State to the point of divesting it of the two conditions required for the formation of an historic title.
>
> "Obviously only acts of opposition can have that effect. So long as the behavior of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded. . . .
>
> "The absence of any reaction by foreign States is sufficient." *Juridical Regime,* 109.

Thus in applying the concept of acquiescence it is clear that an opposing nation must maintain its opposition to the historic bay claim so long as the sovereignty of the claiming nation persists. A corollary to this rule is that in the face of continuing sovereignty a simple and single protest, such as the Japanese note, will not suffice. *Juridical Regime* 112-115. Moreover, to prevent the ripening of historic title the opposing nation must have effectively expressed its opposition at the time the exercise of sovereignty became open and notorious. And even if the foreign nation was not put on actual notice of the claim, because of any interest it had in the area it should have made itself aware of the claim. *Juridical Regime* 128-130.[31]

Applying the foregoing principles to this case it is clear that the only conclusion available to the lower court was

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31. The Supreme Court in *United States v. California*, 381 U.S. 139, 172 (1965), and in *United States v. Louisiana*, 394 U.S. 11, 23 (1969) relied on the reasoning of the *Juridical Regime* cited above.

the one the Court drew—that foreign nations have acquiesced in the United States' and Alaska's claim to Cook Inlet. The evidence clearly demonstrates that since 1906 and even earlier no foreign nation has interfered with the exercise of sovereignty over Cook Inlet so as to divest the United States or Alaska of historic title. And Japan, the only nation to make any kind of protest, did not continue its protest in the face of continuing Alaskan sovereignty over Cook Inlet.

Lastly, the United States completely misstates what is clearly the law in arguing that positive proof of a foreign nation's approval to an historic bay claim is required. But even if that is the law, the evidence clearly showed acceptance by both Canada and Japan of the claim of the United States and Alaska to all of Cook Inlet.

PART TWO

ALL OF COOK INLET'S WATERS ARE INLAND WATERS—NOT TERRITORIAL SEA—LANDWARD OF THE LINE JOINING POINT GORE, THE BARREN ISLANDS AND CAPE DOUGLAS.

The District Court in its Opinion, concluded:

> "All of Cook Inlet located north of the Cape Douglas-Point Gore line, including the Barren Islands, are inland waters of the State of Alaska. Accordingly, under the provisions of the Submerged Lands Act of 1953, the subsurface resources of lower Cook Inlet are vested exclusively in the State of Alaska." (R. 3775; Op. p. 12).[32]

32. By virtue of that conclusion, the state is afforded identical rights in the seabed and subsoil underlying water three miles seaward of the Cape Douglas-Barren Islands-Point Gore line. 43 USC §§1301 (a)(2), 1311. The fact that the Court described the latter grant as

Notwithstanding the detailed findings of the Court as to the extensive authority exercised over the disputed area of Cook Inlet by Russia, the United States, and Alaska, a careful reading of the United States' brief discloses that a principal point upon which it relies in this appeal is that Alaska has proved that Cook Inlet is territorial sea, not inland waters. The United States disputes the Court's conclusion that Cook Inlet is historic inland waters since the evidence fails to disclose an interference with a foreign nation's right of innocent passage.[33] This argument all but concedes the sufficiency of Alaska's proof that Cook Inlet is an historic bay. But further than that, it can only be characterized as a last ditch effort by the United States to grasp the marine resources of lower Cook Inlet by departing from or at least repudiating the materials and authorities it has appended to its brief.

Appellant's argument is supported by no meaningful authority and represents a creature which is not identifiable and which is inconsistent with a large body of established law. In fact, Appellant has had apparent difficulty in clearly articulating its meaning. The theory, as we best understand it, goes something like this: Territorial waters which border the seaward limit of inland waters are different from inland waters only in respect to innocent passage. That is to say, territorial waters are those waters over which the claiming state or nation has exercised acts of sovereignty and control but has not denied the right of innocent passage through such waters by foreign

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a grant of subsurface resources located beneath the territorial sea is merely a recognition of the fact that in Alaska the territorial sea of three miles is co-extensive with the Submerged Lands Act Grant.

33. Article 14, Section 1, of the Convention of the Territorial Sea and the Contiguous Zone (Ex. 53) grants to ships of all nations the right of innocent passage through the territorial sea.

vessels. Inland waters, on the other hand, are those waters over which the claiming state has denied the right of innocent passage as well as having exercised other acts of sovereignty. So Appellant concludes that the only act which will give rise to an implication of the assertion of sovereignty over inland waters is interference with innocent passage (P. 16, Appellant's Brief).

There are at least four reasons why any such theory lacks validity. In the *first* place there is absolutely no evidence in the record, and Appellant has cited none, that shows that either the United States or the State of Alaska has ever permitted or recognized the right of innocent passage of foreign vessels in the disputed area of Cook Inlet. Passage is defined as including the "stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." (P. 11, Appellant's Brief). Every inference in the record, borne out by the express testimony of numerous witnesses, is to the effect that the practice of foreign vessels stopping and anchoring within the confines of lower Cook Inlet would be prohibited. The District Court, it will be noted, relied upon this evidence and expressly found that "Cook Inlet is not and never has been a waterway for intercourse between nations." (Finding 10; R. 3779).

Appellant's claim of historic territorial sea is invalid for a *second* compelling reason. It is to be noted that presumably, if the evidence has established the existence of an historic bay, whether it be inland or territorial, the three requirements must have been established, to wit: the exercise of authority over a continuous period of time, with the acquiescence of foreign nations. Thus, in claiming Cook Inlet to be an historic territorial sea, Appellant must

concede that Alaska has proved the three requirements—a blatant inconsistency with other arguments of the Appellant. If the United States persists in asserting the historic territorial bay theory, it disproves its other contentions that Alaska has not established the three requirements for the emergence of historic title to lower Cook Inlet.

Third, and perhaps more importantly, there is no recognizable authority that supports Appellant's theory of historic territorial bay. In fact the contrary is true, as is shown by the document, *Historic Bays,* Memorandum by the Secretariat of the United Nations, Document A/Conf 131, one of the United States' own exhibits in this case. (Ex. 52). Therein we find:

> "It is always necessary to remember in dealing with 'historic waters', the essential point that those waters are internal waters. This fact explains many aspects which would be otherwise difficult to grasp. The theory was originally evolved to apply to 'bays', and is still referred to as the theory of 'historic bays' because it was never envisaged that it might apply except in areas which, by reason of their configuration, are generally not used as major international routes of transit." *Historic Bays* 117. (See also *Juridical Regime* 163 wherein it is stated that the dominant opinion is that historic bays are internal waters.)

The document, *Juridical Regime,* as we have seen, is replete with statements that there may be numerous ways in which authority may be exercised other than the denial of innocent passage. These include, among others, the denial of fishing rights to foreigners and the enforcement of municipal law over the waters in question. Now, however, Appellant would modify and narrow the first re-

quirement so that, instead of requiring proof of authority by various means, the first requirement would be rephrased to read: "Whatever acts of sovereignty are shown, they are meaningless unless there is also proved a refusal of the right of innocent passage over the area claimed by the nation asserting the historic right." There is no support for this unduly narrow view expressed in the *Juridical Regime* or in any other reference which the State has examined.

Moreover, the authorities recognize that there was no question that when Delaware Bay and Chesapeake Bay were adjudicated to be historic bays, their waters became inland waters of the United States. (1 Op. A.G. 32 (1852)) (Ex. "N"; *Stetson v. U. S.*, No. 3993, Class 1) (2d Court of Commissioners of Alabama Claims; Ex. "O"; See also *Historic Bays* 111; Ex. 52).

Lastly, the Convention on the Territorial Sea and the Contiguous Zone itself refutes the United States' contention that Cook Inlet is territorial sea but not inland waters. (Ex. 53). The rules of Article 7, it will be noted, are prescribed solely for the purpose of defining the baseline for the measurement of territorial sea across the mouths of or within bays, and that waters inside that line are inland waters. Accordingly, the only sensible meaning of Section 6 of that Article (the exception of historic bays) is that a baseline drawn across the bay's entrance encloses inland water.[34]

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34. Paragraph 116, *Historic Bays*, indicates that a bay can contain territorial sea only if the recognized territorial sea of the bay were equal to the width of the territorial sea in the bay. Thus, since one-half of the distance between the headlands of Cook Inlet is 23 miles, the territorial sea of the United States must of necessity be 23 miles. This, of course, is not the case.

PART THREE

THE DISTRICT COURT CORRECTLY APPLIED THE STANDARD OF PROOF FOR THE ESTABLISHMENT OF THE ELEMENTS OF COOK INLET AS AN HISTORIC INLAND WATER BAY.

Here we are concerned with whether Alaska's burden of proof was measured by the ordinary rule— preponderance of evidence—or by a higher standard—clear beyond doubt. In approaching this question, the trial court said:

> "The final qualification concerns the quantum of proof required for a showing of historic title. The expression 'clear beyond doubt', as it first appeared in *United States v. California,* 381 U.S. at 175, could very well not have been intended by the Supreme Court to establish such a high standard of proof in all cases. The context in which that phrase appeared pertained to the legal effect of a disclaimer by the United States in the face of questionable evidence of historic title. The context of this case is clearly distinguishable. Further, there is other language in that case which implies that no rigorous standard of proof is required to prove historic title. 381 U.S., at 174. Nor do the long respected commentators of international law appear to require a rigorous standard of proof. Juridical Regime 158. Despite this uncertainty over the burden of proof, this Court will adhere to the higher standard of proof, for the reason the Court finds the State of Alaska has satisfied the requirements for establishment of historic title even under the more rigorous standard." (P. 6, Opinion).

The line to be drawn between proof, on the one hand, that meets the preponderance standard and proof, on the other hand, that attains the higher standard, is a line that

is difficult to draw. In any case, as Alaska views the problem, the task of evaluating the evidence in the first instance is necessarily the responsibility of the trial judge. Here the Court could have, and with good reason, repudiated the higher standard. Instead, it accepted the federal government's position. Since this leaves its attorneys no other room to complain, they fall back upon the simple assertion that the trial judge did not do what he said he did. Obviously Alaska does not agree with this easy indictment and unilateral conviction of the distinguished trial judge. Neither do we believe that this Court can or should ignore the lower court's Findings in the absence of a showing that they were clearly erroneous.[35] Thus Appellant's argument must be construed as a desperate effort to have this Court close its eyes and disregard the voluminous evidence which was placed before the District Court. For our part, no other conclusion is possible than, having failed to dislodge the Court's Findings in the first fifty-four pages of its brief, Appellant is willing to take a last shot at the trial judge in the closing pages of the brief.

Alaska's position, in short, is that it met the test—whatever that test may be. It is our view that the test should have been the "preponderance of evidence" burden. But, in the light of Judge von der Heydt's more rigorous

35. In applying the "clearly erroneous" rule, the courts have reached the same conclusion where issues must be proved by "clear and convincing evidence." *Carlson v. Naddy*, 181 Minn. 217, 232 N.W. 3 (1930), *Taylor v. Bunnell*, 133 Cal. App. 177, 23 P.2d 1062 (1933). As this Court once stated, it can ordinarily overturn fact findings of the trial court only when it is "left with a definite and firm conviction that a mistake has been committed in any of the trial court's findings." *Fluor Corp. v. United States ex rel. Mosher Steel Company*, 405 F.2d 823 (9th Cir. 1969), cert. den., 394 U.S. 1014, 89 S.Ct. 1632, 23 L.Ed.2d 40 (1949).

requirement, insisted upon by the federal attorneys, Alaska accepted and met that test also. The question, therefore, is not before this Court because the trial judge applied the more rigorous standard.

Appellant's brief refers to the so-called disclaimers as a reason for the application of the "clear beyond doubt" rule. We do not deem it necessary, therefore, to discuss the alleged disclaimers; nevertheless, should the Court desire to examine them closely, we invite attention to Part VI of the trial judge's Findings. (103 through 111; R. 3800-3802). We have nothing to add which would be helpful to this Court in evaluating the disclaimers.

CONCLUSION

In a trial that lasted several weeks and amassed a voluminous record, the State of Alaska proved the three prerequisites for the establishment of lower Cook Inlet as an historic inland water bay. Accepting the burden of proving its case clear beyond doubt, Alaska established and the lower court properly found: (1) the exercise of sovereignty over all of Cook Inlet; (2) over a continued period of time beginning at least in 1906 and possibly earlier and lasting up to the time of this dispute, and (3) with the acquiescence of foreign nations. A close study of this record, we believe, will reveal a conscientious and meritorious consideration of the trial judge to all the evidence, judging its weight and resolving factual disputes where they existed. The conclusion is also inevitable that the trial judge correctly applied the undisputed or uncontested legal principles to the controlling facts. There-

fore, Alaska urges that the judgment of the District Court should be affirmed.

Dated, October 29, 1973.

CHARLES K. CRANSTON

THOMAS M. PHILLIPS

JOHN E. HAVELOCK
Attorney General of Alaska

Attorneys for Appellee
State of Alaska

BAKER & BOTTS
Of Counsel